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15 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
16 IN AND FOR THE COUNTY OF YAVAPAI

17 STATE OF ARIZONA,	)	No. P1300CR20081339
	)	
18 Plaintiff,	)	Div. 6
	)	
19 vs.	)	<b>MOTION TO PRECLUDE LATE</b>
	)	<b>DISCLOSED EVIDENCE,</b>
20 STEVEN CARROLL DEMOCKER,	)	<b>RECONSTRUCTION AND</b>
	)	<b>OPINIONS FROM THE STATE'S</b>
21 Defendant.	)	<b>50-54<sup>th</sup> SUPPLEMENTAL</b>
	)	<b>DISCLOSURES</b>
	)	
	)	(Oral Argument Requested)

22 **MOTION**

23 Steven DeMocker, by and through counsel, hereby respectfully requests that this  
24 Court exclude evidence, reconstructions and opinions from the trial in this matter that  
25 the State late disclosed to the defense on March 2, 17, 19, 24, and 25, 2010. This  
26 motion is based on the Due Process Clause, the Confrontation Clause, the Eighth  
27  
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SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA

2010 MAR 30 PM 2: 19 ✓

JEANNE HICKS, CLERK

BY: S. KELBAUGH

1 Amendment and Arizona counterparts, Arizona Rules of Evidence, Arizona Rules of  
2 Criminal Procedure and the following Memorandum of Points and Authorities.

3  
4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 A detailed history of the State's disclosure violations has been provided to the  
6 Court in prior pleadings and will not be duplicated here. The disclosure deadline was  
7 set by the Court on May 12, 2009, for June 22, 2009. The State has repeatedly ignored  
8 this deadline. The State disclosed over 25,000 pages in February and has now disclosed  
9 several thousands of pages in March, nine months after the deadline imposed by the  
10 Court. The State's practice has crippled the defense's ability to prepare for trial, review  
11 the disclosure, research and hire its own experts, and prepare to confront the State's  
12 evidence in a death penalty case that has been pending for over a year and a half. Trial  
13 is now *five weeks away*.

14 Rule 15.7 gives the Court wide discretion in imposing a sanction. The State  
15 should not be permitted to thwart the Court's disclosure deadlines until mere weeks  
16 before a death penalty trial when the Court made clear in May of 2009 that extensions  
17 for disclosure would be granted only where good cause was shown. The permitted  
18 sanctions under Rule 15.7 include precluding or limiting the calling of a witness, use of  
19 evidence or argument; dismissing a case; granting a continuance or declaring a mistrial;  
20 holding counsel in contempt; imposing costs; or other appropriate sanctions. This Court  
21 should exclude the late disclosed evidence based on the pattern of conduct evidenced by  
22 the State in this case. The State has offered no explanation for its repeated failures to  
23 exercise due diligence nor has it proposed any alternative sanction. Given the depth and  
24 breadth of the violations at issue and the limited time to trial, in a case where Mr.  
25 DeMocker's life is on the line, preclusion is the only appropriate remedy. Counsel have  
26 also requested that the Court dismiss the death penalty as a sanction for the cumulative  
27 disclosure violations and prejudice resulting from the State's conduct.

1                   **1. Sergeant Dan Winslow Reconstruction and Shoe Print Comparison**  
2                   **(19762-3)**

3                   Seventeen months after Ms. Kennedy's murder, Sergeant Dan Winslow returned  
4 to the land behind Ms. Kennedy's home and purported to measure the distance between  
5 the path of bike tracks that were located at the scene seventeen months earlier, but never  
6 before measured by law enforcement. For the first time, seventeen months later, Sgt.  
7 Winslow photographed and measured his estimation of where bike tracks were located  
8 over a year ago. Sgt. Winslow now purports to rely on these measurements and  
9 photographs to estimate distances between the bike tracks and the gate and the distance  
10 the bike track travelled and returned to the gate.

11                  In the same late produced supplemental report, Sgt. Winslow also purports to  
12 compare shoe prints in photos to shoe prints he either remembers or compares to other  
13 photos of tracks from a different area (the report does not specify). He purports to be  
14 able to determine the direction the tracks are travelling, how many tracks are present in  
15 the photos, and to compare shoe tracks from several different photos.

16                  Sgt. Winslow's reconstruction and shoe print comparison was done after his  
17 interview by the defense. This information is being disclosed with less than six weeks  
18 to trial, it is incredibly unreliable and Sgt. Winslow is not qualified to reconstruct  
19 evidence of bike tracks or to compare shoe tracks. He is not disclosed as an expert on  
20 either subject. The Court should preclude Sgt. Winslow from offering any testimony as  
21 to either of these late performed, unverifiable measurements, and unqualified shoe print  
22 comparisons.

23                   **2. Commander Mascher Report on Shoe Print Comparison(19764)**

24                  On March 17, 2010, the State produced a supplemental report from Commander  
25 Scott Mascher. In this report, Cmdr. Mascher purports to compare a sample shoe from  
26 La Sportiva (which the defense has not received) to a photo of a shoe print from the  
27 crime scene. He then purports to draw conclusions based on his comparison about the  
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1 heel patterns on the shoes and about the size of the prints from the photos at the crime  
2 scene. Cmdr. Mascher also purports to perform an examination by tracing tread  
3 patterns from the sample shoe and comparing it to photographs from the crime scene  
4 and to again draw conclusions about comparing the prints to the sample shoe.

5 Cmdr. Mascher should be precluded from testifying as to either his examination  
6 of the sample shoe, his comparison of the sample shoe to the crime scene photos or any  
7 conclusions about these comparisons. Cmdr. Mascher is not disclosed as a shoe print  
8 identification expert. He was late disclosed as a shoe tracking expert and a motion to  
9 preclude based on his late disclosure is pending before the Court on this issue. When  
10 Cmdr. Mascher was disclosed as an expert, Deputy County Attorney Butner explained  
11 to the Court that Cmdr. Mascher was not a shoe print identification expert. "[T]racking  
12 is to be distinguished from shoeprint identification. Okay?" Mr. Butner explained that  
13 Detective Kennedy and Cmdr. Mascher would be testifying about tracking and would  
14 not be testifying about the identity of the shoe versus a shoe that was discovered. Mr.  
15 Butner advised that he was not going to be asking these witnesses about the identity of  
16 these shoe prints.

17 Based on the disclosure received on March 17, 2010, Cmdr. Mascher now  
18 appears to be making precisely the kind of comparisons that the State previously  
19 acknowledged he was not qualified to make, and that he has not been offered as an  
20 expert to make. This information is being disclosed with less than six weeks to trial.  
21 Any opinions or testimony from Mascher about these experiments or his opinions on  
22 these issues should be excluded pursuant to Rule 702 and pursuant to Rule 15.7.

23 **3. DPS Computer Forensic Examinations (CDs 6210, 6221, 6222, 6223,**  
24 **6224, 6225, 6228 and 19810-11)**

25 On March 2 and March 17, 2010, the State provided the defense with a total of  
26 seven CDs from Arizona DPS relating to computer forensic examination of electronic  
27 data that has been in the State's possession since July of 2008. These reports indicate

1 that DPS examination is incomplete and is ongoing. DPS computer forensic  
2 examination experts are the subject of a previous motion to preclude based on the  
3 State's late and incomplete disclosure. Now, with less than six weeks to trial, the State  
4 has disclosed CDs with thousands of pages of reports and emails. There is no way for  
5 the defense to review this data. There is an estimated 8,500 pages on these CDs.

6 The defense has a right under the Sixth Amendment to confront the State's  
7 evidence. The fact that the defense has had the forensic data for independent review is  
8 not relevant to its ability to review and prepare to confront the State's analysis. If the  
9 Court permits this information to be introduced, Mr. DeMocker's right to confront the  
10 evidence against him will be violated. The volume of evidence disclosed at this late  
11 date makes the task of review and preparation simply impossible.

12 Furthermore, the State had this evidence and did not begin to review and  
13 examine it for months. With respect to the particular reports on the recently disclosed  
14 CDs, CDs 6224, 6228 and 6222 note the examination was not even requested until  
15 February of 2010. The report on CD 6221 notes that item 1504 was not processed until  
16 January 2010. The fact that the State waited for over a year to request and conduct  
17 examination of these multiple items of computer forensic evidence is simply  
18 unacceptable. The prejudice to the defense cannot be overstated. The CDs contain  
19 thousands of emails as attachments to reports and most CDs contain multiple forensic  
20 reports. The State is offering this evidence as proof of motive. There have been serious  
21 questions as to the reliability of the extraction of the data by the State. The State has  
22 used an unqualified non-expert to perform most of the extraction and examination of  
23 these items. The State did not remove the power source from one of the items and  
24 caused destruction of some of the files. The State has also never provided the defense  
25 with the requested En Case files and has either misunderstood or misrepresented the  
26 existence of this data to the court. The importance of the defense review of this data  
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1 and analysis cannot be overstated in these circumstances. This evidence should be  
2 excluded by the Court based on its late and incomplete disclosure and based on the  
3 State's interference with Mr. DeMocker's Sixth Amendment right to confront this  
4 evidence.

5 **4. La Sportiva Information (19665-19675, 19765-19767, 19812 & CD WW)**

6 On March 17, 2010, the State disclosed additional information regarding La  
7 Sportiva shoes. This includes information that appears to be from a website,  
8 information about sample shoes that were sent to the State (but not provided to the  
9 defense), further discussion between the State and a late disclosed expert, a CD of  
10 photos, and sales data regarding certain shoes. This issue has been briefed multiple  
11 times for this Court. Given that the State wrongfully withheld this information from the  
12 defense for five months, obstructing any defense ability to investigate the shoe soles and  
13 footprints, this information should be excluded pursuant to Rule 15.7.

14 **5. Jail Visit Recordings**

15 On March 17, 2010, the State disclosed three CDs of jail visits of Mr. DeMocker  
16 from January of 2010. Only two of these CDs were operational. The defense has  
17 advised the State but no replacement CD has been disclosed. This is the first time that  
18 personal visits between Mr. DeMocker and visitors at the jail have been disclosed to the  
19 defense. No summaries or reports of these visits have been disclosed.

20 The parties have previously litigated what, if any, statements of Mr. DeMocker's  
21 the State would be permitted to rely upon given the State's failure to abide this Court's  
22 orders and Rule 15.1's requirements of disclosure of Mr. DeMocker's statements. At no  
23 time has the State provided notice that it intends to introduce statements from any jail  
24 visits of Mr. DeMocker. These statements should be excluded.

25 **6. Sorenson Forensic Testing (19814-19815 and 19870-19873)**

1           On March 19 and 25, 2010, and the State disclosed Sorenson Forensic testing  
2 requests for four individuals. These individuals are unknown to the defense and no  
3 other disclosure has been provided about these individuals. There are no police reports  
4 about or referring to these individuals and no interviews of or referring to these  
5 individuals. The defense has no idea why these individuals are being tested now, with  
6 less than six weeks to trial. This information should be excluded based on the State's  
7 failure to provide disclosure to the defense pursuant to Rule 15.7.

8           **7. FIA Card Services (Bates 18985-19045)**

9           On March 17, 2010 the State disclosed information from FIA Card services for  
10 accounts that were known to the State in December of 2008. The State has had  
11 information regarding this evidence for over a year after and well before the disclosure  
12 deadline in this case. The State has not provided any reason for its failure to exercise  
13 due diligence in requesting and disclosing these records. Given the volume of  
14 disclosure in this case and the time left to trial, the defense is not able to review and  
15 evaluate this evidence, in addition to the tens of thousands of other pages of late  
16 disclosure, prepare this evidence for defense experts and confront the State's evaluation  
17 of this evidence. This evidence should be excluded pursuant to Rule 15.7 in the absence  
18 of good cause shown for its late disclosure.

19           **8. Phone Records (19267-19363, 19828-19860)**

20           On March 15, 2010, the State disclosed phone records for the period between  
21 June 17 and June 21, 2009, for a variety of telephone numbers, to the defense. The  
22 State did not subpoena these records until February 2010. By the State's own admission  
23 it has been aware of the evidence to which it believes these records allegedly relate  
24 since mid June of last year. In the absence of good cause demonstrated for its failure to  
25 request and disclose this evidence in accordance with the Court's disclosure deadline or  
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27  
28

1 at least earlier than eight months after the fact, it should be excluded pursuant to Rule  
2 15.7.

3 **9. Provident Funding Documents (19364-19655)**

4 On March 17, 2010, the State disclosed information from Provident Funding  
5 regarding a mortgage on Bridle Path. This Provident mortgage was known to the State  
6 at least as early as November 2008. Yet the State did not subpoena the information  
7 until March of 2010. The State provides no rationale for ignoring its duty of due  
8 diligence and dumping this and other documents on Mr. DeMocker with less than six  
9 weeks to trial. The defense is simply not able to keep pace with the State's late  
10 disclosure and is unable to review and prepare to confront this evidence. This  
11 information should be excluded pursuant to Rule 15.7.

12 **10. Purchases from February 2008 (19821-19827) and New Witness**

13 On March 24, 2010, the State disclosed records for February 2008 purchases by  
14 Mr. DeMocker from a floral shop. This transaction was known to the State in  
15 November of 2008. (Bates 1353). The State provides no reason why it waited until less  
16 than six weeks before trial to disclose additional detail and a new witness with respect  
17 to this information.

18 **CONCLUSION**


19 The Court should exclude the above described evidence based on its late  
20 disclosure. The evidence was known to the State months, and in some cases well over a  
21 year, before it was disclosed to the defense. The State failed to exercise due diligence to  
22 request and disclose the evidence to the defense. The State has not offered any good  
23 cause for its failure to exercise due diligence. The late disclosure has prejudiced the  
24 defense's ability to prepare for trial and confront the evidence, as outlined above and in  
25 prior motions. The evidence should therefore be excluded pursuant to Rule 15.7.



1 Defendant Steven DeMocker, by and through counsel, hereby requests that this  
2 Court prohibit the State from offering late disclosed evidence, reconstructions and  
3 opinions as described above.

4 DATED this 30<sup>th</sup> day of March, 2010.

6 By:

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16 Attorneys for Defendant

17 **ORIGINAL** of the foregoing hand delivered for  
18 filing this 30<sup>th</sup> day of March, 2010, with:

19 Jeanne Hicks  
20 Clerk of the Court  
21 Yavapai County Superior Court  
22 120 S. Cortez  
23 Prescott, AZ 86303

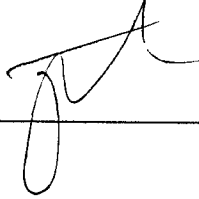
24 **COPIES** of the foregoing hand delivered this  
25 this 30<sup>th</sup> day of March, 2010, to:

26 The Hon. Thomas B. Lindberg  
27 Judge of the Superior Court  
28 Division Six  
120 S. Cortez  
Prescott, AZ 86303

Joseph C. Butner, Esq.

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Yavapai Courthouse Box

A handwritten signature in black ink, appearing to be 'A. J.', is written over a horizontal line that spans the width of the page. The signature is positioned above the line, with the 'A' being the most prominent part.